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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

HEATHER RICH, Plaintiff and Appellant, v. KOI RESTAURANT et al., Defendants and Respondents.	B196078 (Los Angeles County Super. Ct. No. BC323185)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Shepard Wiley, Judge. Affirmed.

Rastegar & Matern, Matthew J. Matern, Sandra M. Falchetti, Paul J. Weiner, and Thomas S. Campbell, for Plaintiff and Appellant.

Law Office of Bruce Adelstein, Bruce Adelstein, and Edward J. Horowitz, for Defendants and Respondents.

In appellant Heather Rich's action against her employer, respondent Koi, L.P., dba Koi Restaurant, the trial court granted summary adjudication in favor of respondents Nick Haque, Dipu Haque, and Koi G.P., Inc. (Koi G.P.) on her claim for sexual harassment. Following trial against the remaining defendants, judgment was entered in Rich's favor, and the trial court denied Rich's motion for a new trial, which asserted that the jury's award of punitive damages was inadequate. Rich challenges the grant of summary adjudication and the denial of the new trial motion. We affirm.

RELEVANT FACTUAL AND PROCEDURAL HISTORY

A. *Complaint and Pre-Trial Proceedings*

In October 2004, Rich initiated the underlying action against respondents, together with Andrew Spence and Robb Lucas. Her first amended complaint, filed June 21, 2005, asserts a claim for sexual harassment under the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.), claims for violations of the Labor Code, and a claim for unfair business practices (Bus. & Prof. Code, § 17200). The complaint alleged that while Rich was employed at Koi Restaurant, she was sexually harassed by Spence, who was her supervisor and a managing agent of Koi Restaurant, as well as by Lucas, another manager. The complaint also alleged that Koi Restaurant was the alter ego of Nick Haque, Dipu Haque, Koi G.P., and Koi, L.P.[1]

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[1] The complaint asserted claims against "Koi Restaurant, an unknown entity," and "Koi, L.P., a California limited partnership"; as noted below, for a period prior to trial, the parties treated Koi Restaurant as an entity potentially distinct from Koi, L.P. On appeal, there is no dispute that "Koi Restaurant" is a business name for Koi, L.P., which is liable for the obligations of Koi Restaurant. (*Providence Washington Ins. Co. v. Valley Forge Ins. Co.* (1996) 42 Cal.App.4th 1194, 1200; *Pinkerton's, Inc. v. Superior Court* (1996) 49 Cal.App.4th 1342, 1348-1349.) As the parties' briefs generally refer to

On December 9, 2005, Dipu Haque, Koi, L.P., and Koi G.P. sought summary adjudication on Rich's sexual harassment claim, contending that she had not exhausted her administrative remedies regarding them. They argued that her complaints to the California Department of Fair Employment and Housing (DFEH) failed to name them. In opposition to the motion, Rich contended that "Koi Restaurant" was a business name for Koi, L.P., which was the alter ego of Dipu Haque and Koi G.P. The trial court granted summary adjudication solely in favor of Dipu Haque and Koi G.P. On March 23, 2006, Nick Haque sought summary adjudication on the FEHA claim on similar grounds. Rich opposed the motion on the ground that Koi Restaurant was Nick Haque's alter ego. The trial court also granted summary adjudication in favor of Nick Haque.

B. *Trial and Judgment*

A jury trial on Rich's remaining claims began on September 13, 2006. The evidence at trial established that Rich met Spence when they worked together at a restaurant in Venice. After Spence became a general manager at Koi Restaurant, he hired Rich as a server in June 2002. Lucas worked in the restaurant as head sushi chef. When Rich's apartment in Venice became flooded, Spence invited her to rent a room in his apartment, where he was living with a woman. She agreed.

The key disputes at trial concerned the nature of Rich's relationship with Spence and Lucas and their conduct toward Rich at Koi Restaurant. Rich testified that soon after she began working at the restaurant, she went on two dates with Lucas, but did not have sexual intercourse with him, although they "made out." After the second date, he phoned her, but she did not respond. In the restaurant,

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Rich's employer as "Koi Restaurant," we do so as well, unless the context requires an express reference to Koi, L.P.

Lucas began making offensive jokes to her about the odor of her private parts, despite her requests to stop.

Rich stated that she neither had nor invited an intimate relationship with Spence. According to Rich, about a month after she began working at the restaurant, Spence began to engage in offensive conduct in the restaurant, despite her requests to stop. He rubbed her, grabbed her hair, hit her on the "butt," and made vulgar comments to her; in addition, he tried to kiss and hug her against her will. On occasion, Spence pulled her onto his lap when he sat down. Whenever he did this, she jumped away. At some point, Spence began assigning her to less desirable stations in the restaurant and less desirable working shifts. During the final month she was employed in the restaurant, Spence asked her to perform oral sex while they were in his apartment. She refused and moved out of the apartment.

Rich testified that on September 30, 2002, the last night she worked in the restaurant, Lucas repeated his offensive joke about her. She asked him to stop. Later, when she pointed out that he had made a mistake in preparing one of her orders, he began screaming at her in front of customers. Spence took her to his office, where he yelled at her about customer complaints. Rich concluded that Lucas and Spence were improperly targeting her, and decided not to return to work.

Spence testified that after Rich moved into his apartment, they began an intimate relationship -- involving one or two episodes of intercourse and other activities -- that lasted approximately one month. While Spence and Rich worked in the restaurant, he kissed Rich and touched her breasts and buttocks; in addition, she sometimes sat on his lap. Spence testified that these activities were

consensual. He also gave Rich some preferential treatment, which stopped when their relationship ended.

According to Spence, there was a lot of "sexual joking" in the restaurant, and he sometimes participated in it. He heard Lucas make such jokes to Rich, but did not stop it. According to Spence, many customers complained about Rich's performance as a server. On the last night Rich worked at the restaurant, she became angry at Lucas for preparing an order incorrectly and left the restaurant.

Lucas testified that Koi Restaurant hired him in March 2002, and he served as head sushi chef. He dated Rich for a period while he worked at the restaurant, and had sexual intercourse with her at least twice. He acknowledged that he once made a joke to Rich about her odor while they worked together in the restaurant's kitchen. The last night Rich worked at the restaurant, she accused him of making an error in an order and angrily left the restaurant.

Dipu Haque testified that he is president of Koi G.P. and Koi, L.P., and that he had little connection with the daily operations of Koi Restaurant, although he visited it two or three times per week. He did not recall seeing Rich in the restaurant.

Nick Haque, Dipu's brother, testified that he ran the restaurant on a day-to-day basis, but had no ownership interest in Koi G.P. or Koi, L.P. while Rich was employed at Koi Restaurant. He was unaware that Spence had sexually harassed Rich. When he received a letter from Rich in October 2002 alleging incidents of harassment, he asked an attorney, Richard Drapkin, to investigate the allegations. After Nick Haque talked to Spence and Lucas, he determined that Rich's allegations were at least partially true. He phoned Rich, assured her that her job was "safe," and invited her back to work. She did not return. He fired Spence in

December 2002, after he discovered that Spence had been stealing wine from the restaurant.

Drapkin testified that he investigated Rich's allegations, and concluded she was having a sexual relationship with Spence. He also learned that Lucas had made a sexual joke to Rich that she found offensive. He advised Koi Restaurant to provide its employees with training regarding sexual harassment.

Before the close of the presentation of evidence, Rich dismissed her Labor Code and unfair business practices claims, leaving the sexual harassment claim against Spence, Lucas, and Koi Restaurant. On September 29, 2006, the jury returned its special verdicts. On November 7, 2006, in accordance with the special verdicts, the trial court entered a judgment awarding Rich $23,500 in compensatory damages jointly against Spence and Koi, L.P., $5,000 in compensatory damages jointly against Lucas and Koi, L.P., $9,000 in compensatory damages solely against Koi, L.P., and $5,000 in punitive damages against Spence.

C. *New Trial Motion*

On November 22, 2006, Rich filed her notice of intention to move for a new trial. Rich's motion contended that the jury's special verdicts denying punitive damages against Koi, L.P., were erroneous as a matter of law (Code Civ. Proc. § 657, subds. 5-7). The trial court denied the motion on January 4, 2007. This appeal followed.

DISCUSSION

Rich contends that the trial court erroneously (1) granted summary adjudication in favor of Nick Haque, Dipu Haque, and Koi G.P. and (2) denied her new trial motion.

A. *Summary Adjudication*

Rich contends that the trial court improperly granted summary adjudication in favor of the Haques and Koi G.P. on the ground she had failed to exhaust her administrative remedies against them.

1. *Standard of Review*

"A summary adjudication motion is subject to the same rules and procedures as a summary judgment motion. Both are reviewed de novo. [Citations.]" (*Lunardi v. Great-West Life Assurance Co.* (1995) 37 Cal.App.4th 807, 819.)

"Summary judgment is proper if there is no triable issue of material fact and the moving party is entitled to summary judgment as a matter of law. (Code Civ. Proc., § 437c.)" (*National Auto. & Cas. Ins. Co. v. Underwood* (1992) 9 Cal.App.4th 31, 36.) "'Review of a summary judgment motion by an appellate court involves application of the same three-step process required of the trial court. [Citation.]'" (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1662.) The three steps are (1) identifying the issues framed by the complaint, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact. (*Ibid*.)

2. *Exhaustion of Administrative Remedies*

Rich contends that summary adjudication was improper despite her failure to name the Haques and Koi G.P. in her DFEH charges. She argues that she was not obliged to identify them separately in the DFEH charges because the charges named Koi Restaurant, whom she asserts is the alter ego of the Haques and Koi G.P. For the reasons explained below, we disagree.

Subdivision (b) of Government Code section 12960 requires that a DFEH charge "shall state the name and address of the person [or] employer . . . alleged to have committed the unlawful practice complained of, and . . . shall set forth the particulars thereof . . . ."[2] As our Supreme Court has explained, "[u]nder the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing (Department) and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. [Citations.] The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. [Citations.]" (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 492.) The primary purpose of this requirement is to facilitate the investigation and conciliation processes of the DFEH. (*Cole v. Antelope Valley Union High School Dist.* (1996) 47 Cal.App.4th 1505, 1514 (*Cole*).)

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[2] Subdivision (b) of Government Code section 12960 provides in pertinent part: "Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing, that shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, and that shall set forth the particulars thereof and contain other information as may be required by the department."

Ordinarily, a court may not consider incidents of discrimination not previously included in a DFEH charge unless they are "'like or reasonably related'" to allegations contained in the administrative charge, or are reasonably likely to be encompassed by an investigation of the allegations in the charge. (*Sandhu v. Lockheed Missiles & Space Co.* (1994) 26 Cal.App.4th 846, 858-859; *Baker v. Children's Hospital Medical Center* (1989) 209 Cal.App.3d 1057, 1064.) Nonetheless, in *Denney v. Universal City Studios, Inc.* (1992) 10 Cal.App.4th 1226, 1232-1234 (*Denney*), disapproved on another ground in *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1156, the court recognized an equitable exception to this rule when the failure to include allegations in the administrative charge is attributable to the DFEH.[3]

In contrast, no California state court has held that a plaintiff may assert a FEHA claim against a party not mentioned in the DFEH charge, although some courts have suggested that equitable considerations may permit such claims in special circumstances. (*Medix Ambulance Service, Inc. v. Superior Court* (2002) 97 Cal.App.4th 109, 115-119 (*Medix*); *Cole*, *supra*, 47 Cal.App.4th at pp. 1511-1515; *Saavedra v. Orange County Consolidated Transportation Etc. Agency*

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3 In *Denney*, the plaintiff filled out an Equal Employment Opportunity Commission (EEOC) intake questionnaire, alleging he had been discharged due to his age and physical disabilities, as well as in retaliation for his use of grievance procedures. (*Denney*, *supra*, 10 Cal.App.4th at pp. 1230-1231.) Over the plaintiff's objection, an EEOC employee included only the plaintiff's allegations of age discrimination in his EEOC charge, which was forwarded to the DFEH. (See *id.* at p. 1231.) Subsequently, the plaintiff filed an untimely complaint with the DFEH regarding age discrimination, disability discrimination, and retaliation. (*Ibid.*) The appellate court concluded that the plaintiff's EEOC intake questionnaire satisfied the FEHA exhaustion requirement concerning his allegations of disability discrimination and retaliation, reasoning that "neither equity nor the purposes of the exhaustion requirement would support or permit barring [his] claims." (See *id.* at p. 1234.)

(1992) 11 Cal.App.4th 824, 826-827 (*Saavedra*); *Martin v. Fisher* (1992) 11 Cal.App.4th 118, 121-123 (*Martin*); *Valdez v. City of Los Angeles* (1991) 231 Cal.App.3d 1043, 1060-1061 (*Valdez*).)

This issue was first confronted in *Valdez*. There, the plaintiff failed to name three individuals in his DFEH charge, and the trial court granted summary judgment in their favor on the plaintiff's FEHA claims. (*Valdez, supra*, 231 Cal.App.3d at pp. 1060-1061.) In affirming the ruling, the majority in *Valdez* noted that the federal authority regarding the analogous issue under title VII (42 U.S.C. § 2000e et seq.) was in conflict: "The Ninth Circuit permits a suit against an unnamed party if the party's involvement was likely to have been revealed in the course of the administrative investigation. [Citation.] The Fourth Circuit takes a more restrictive view, requiring that the party must have been named somewhere in the body of the charge. [Citation.] The Seventh Circuit takes a middle ground in which suing an unnamed party is subject to a balancing of equitable considerations. [Citation.]" (*Id*. at p. 1061.) The majority concluded that the rule adopted by the Fourth Circuit "is more efficacious, will lead to more speedy resolution of disputes at the administrative level, and is in keeping with the requirement of exhaustion of administrative remedies." (*Valdez, supra*, 231 Cal.App.3d at p. 1061.) In contrast, the dissent argued that the plaintiff's failure to name the individuals could be attributed to features of the DFEH charge form. (*Valdez*, at pp. 1062-1064.)

In *Martin*, the plaintiff named an individual in the body of her DFEH charge, but failed to identify him as a party in the caption of the charge. (*Martin, supra*, 11 Cal.App.4th at p. 119.) The appellate court distinguished the facts before it from those presented in *Valdez*, and characterized the *Valdez* court's endorsement of the Fourth Circuit's rule as dictum. (*Martin, supra*, 11

Cal.App.4th at p. 121.) As in *Valdez*, the court identified three conflicting approaches followed by federal courts: the Ninth Circuit's view (also followed by two other circuits), the Fourth Circuit's rule, and a "'middle ground'" approach adopted by the several circuits that "'look[ed] principally at whether the named and unnamed parties have an "identity of interests."'" (*Martin*, *supra*, 11 Cal.App.4th at pp. 121-122, quoting Schlei & Grossman, Employment Discrimination Law (1989 Supp.) pp. 415-416.) The court concluded that none of these approaches would bar the plaintiff from asserting a FEHA claim against the individual named in her DFEH charge. (*Martin, supra*, 11 Cal.App.4th at pp. 122-123.)

In *Saavedra*, the court reached a similar conclusion on materially identical facts, relying on *Martin*. (*Saavedra, supra*, 11 Cal.App.4th at pp. 825-828.) Moreover, pointing to *Denney* and the dissent in *Valdez*, the court expressly declined to adopt the Fourth Circuit's rule, which -- the court suggested -- would deny equitable relief when a deficiency in the DFEH charge was attributable to DFEH. (*Saavedra*, *supra*, 11 Cal.App.4th at pp. 825-828.)

In *Cole*, the plaintiff asserted FEHA claims against one individual named in the body -- but not the caption -- of the plaintiff's DFEH charge, and two individuals nowhere named in the charge. (*Cole*, *supra*, 47 Cal.App.4th at p. 1509.) Regarding the former individual, the court held that the FEHA claim was viable under *Valdez*, *Martin*, and *Saavedra*. Regarding the latter individuals, the court followed *Valdez* and reached the contrary conclusion, reasoning that subdivision (b) of Government Code section 12960, by its plain language, mandated the application of the Fourth Circuit's rule. (*Cole*, *supra*, 47 Cal.App.4th at p. 1515.)

In *Medix*, the plaintiff's DFEH charge for sexual harassment named her employer and Eric Saline, a supervisor, but contained no reference to Michael and Joanna Dimas, two other supervisors. (*Medix*, *supra*, 97 Cal.App.4th at p. 113.) She initiated a FEHA action in court against her employer and the three supervisors, alleging in her complaint that the Dimases were shareholders in her employer, which was their alter ego. (*Medix*, *supra*, 97 Cal.App.4th at pp. 112-113.) The Dimases demurred to the complaint on the ground that no administrative charge had been asserted against them. (*Ibid*.) After the trial court overruled the demurrer, the appellate court reversed. (*Id*. at p. 119.) The court examined *Valdez*, *Martin*, *Saavedra*, and *Cole*, and concluded: "None of these cases held that a harassment case may proceed against one not mentioned in the administrative complaint. Nor is there any authority . . . that the doctrine of alter ego somehow obviates compliance with the statutory requirements." (*Medix*, *supra*, 97 Cal.App.4th at p. 116.)

3. *Analysis*

We turn to Rich's contention that summary adjudication was improperly granted on her FEHA claim against the Haques and Koi G.P. Rich's first amended complaint alleged in connection with each claim that Koi Restaurant and Koi, L.P. were undercapitalized sham companies that functioned as the alter egos of the Haques and Koi G.P., and that recognizing their separate existence would "sanction fraud and permit injustice . . . to the detriment of creditors and other interested parties as set forth above." In seeking summary adjudication, the Haques and Koi G.P argued that Rich's claims against them failed under *Medix*, as Rich conceded that her DFEH charges mentioned only Spence, Lucas, and Koi

Restaurant.[4] In response, Rich submitted evidence that the Haques had notice of her DFEH charges and that Koi Restaurant was, in fact, the alter ego of the Haques and Koi G.P. In addition, Rich stated in a declaration that she was unaware of the existence of Koi L.P. and Koi G.P. and the pertinent alter ego relationships when she filed her DFEH complaints.

The trial court concluded that Rich failed to raise a triable issue material to the propriety of summary adjudication. We agree. As explained above (see pt. A.2., *ante*), California courts have generally held that the failure to name a party in the DFEH charge is fatal to a FEHA action against the party. To the extent the courts have contemplated exceptions to this rule grounded on equitable considerations, they have tied any such exception closely to the functions of the exhaustion requirement.

The necessity for this close connection is underscored in *Cole*: "By requiring that a DFEH charge include the names and addresses of persons who allegedly discriminated against the complainant, the Legislature insured that the administrative investigation, conciliation attempts, and evidentiary proceedings would encompass the entire sphere of the alleged discrimination. To allow a complainant to sue individuals in a state court action on a FEHA cause of action without having brought them within the scope of the comprehensive administrative process by naming them as perpetrators of discrimination at the outset would undermine the purposes of the fair employment statute." (*Cole*, *supra*, 47 Cal.App.4th at p. 1514.) The court in *Valdez* also stated: "For a claimant to withhold naming of known or reasonably obtainable defendants at the administrative complaint level is neither fair under [FEHA] in its purpose of

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[4] There is no dispute that on September 30, 2003, Rich filed three DFEH complaints against, respectively, Spence, Lucas, and Koi Restaurant.

advancing speedy resolutions of claims nor fair to known, but unnamed individuals, who at a later date are called upon to 'personally' account in a civil lawsuit without having been afforded a right to participate at the administrative level." (*Valdez, supra*, 231 Cal.App.3d at p. 1061.)

In our view, the statutory purposes in question constrain the application of the alter ego doctrine. Generally, "two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone. [Citations.]" (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.) As the alter ego doctrine is equitable in nature, any exception to the exhaustion requirement predicated on it must be tied closely to the goals of the DFEH administrative process. Accordingly, to avoid a defense predicated on the requirement, Rich was obliged to show that the purported alter ego relationships precluded administrative proceedings that "would encompass the entire sphere of the alleged discrimination." (*Cole, supra*, 47 Cal.App.4th at p. 1514.)

Here, Rich's first amended complaint alleged in general terms the existence of alter ego relationships, but did not state they prevented her from naming the Haques and Koi G.P, in her DFEH charges. The complaint asserted that Nick Haque was Rich's supervisor at Koi Restaurant, and thus established that Rich knew about his existence when she filed her DFEH charge. As the allegations regarding Nick Haque are similar to those against the Dimases in *Medix*, the allegations do not avoid the defense he raised. Although the complaint alleges that Dipu Haque and Koi G.P. owned or operated Koi Restaurant, it does not

assert that Rich did not know -- or could not reasonably have discovered -- that they controlled the restaurant when she filed her DFEH charges. As the court explained in *Valdez*, to facilitate the DFEH administrative process, FEHA claimants may properly be required to name "known or reasonably obtainable defendants" in the DFEH charge. (*Valdez, supra,* 231 Cal.App.3d at p. 1061.)

Because the allegations in the complaint failed to avoid the defense raised upon summary adjudication, the burden shifted to Rich to show the existence of triable issues regarding the application of the defense.[5] This she did not do. The record establishes that Rich filed her DFEH charges on September 30, 2003, almost a year after the date of the last incident of misconduct, as identified in the charges. The charges disclose on their face that she was then represented by the law firm that later filed her original complaint in October 2004, which asserted a sexual harassment claim against the Haques and Koi G.P. and contained alter ego allegations. Rich's declaration asserts that she was unaware of Koi G.P., Koi, L.P., and the pertinent alter ego relationships when she filed her DFEH charges, but does not state how she discovered these alleged facts and why she did not uncover them sooner. Rich thus offered no evidence that the Haques and Koi G.P. were not "reasonably obtainable [as] defendants at the administrative complaint level" (*Valdez, supra,* 231 Cal.App.3d at p. 1061). Although the alter ego doctrine may provide relief from the exhaustion requirement in some circumstances -- when, for example, the alter ego relationship effectively hides an individual's

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[5] When, as here, "the moving defendant argues that it has a complete defense to the plaintiff's cause of action, the defendant has the initial burden to show that undisputed facts support each element of the affirmative defense. Once it does so, the burden shifts to plaintiff to show an issue of fact concerning at least one element of the defense. [Citation.]" (*Bacon v. Southern Cal. Edison Co.* (1997) 53 Cal.App.4th 854, 858.)

control over the employer from the claimant -- no such circumstances were established here.

Relying on federal authority derived primarily from the Ninth Circuit, Rich contends that FEHA actions may be properly asserted against parties not named in a DFEH charge. We do not find this authority persuasive, as California state courts have declined to apply the Ninth Circuit's approach regarding the exhaustion requirement under title VII to FEHA.

Rich contends that the statutory requirements under FEHA regarding DFEH charges do not bar an action against parties unnamed in a charge when their liability arises solely from an alter ego relationship with a party named in the charge. She asserts that she does not allege that the Haques and Koi G.P were "perpetrators of the harm she endured." Pointing to subdivision (b) of Government Code section 12960, which requires the DFEH charge to name the parties "alleged to have committed the unlawful practice complained of," Rich argues that DFEH charges need only name the "perpetrators of the harm," but not parties -- such as the Haques and Koi G.P. -- who are liable for misconduct exclusively on the basis of an alter ego relationship.[6]

Rich misapprehends the import of the language in subdivision (b) of Government Code section 12960. As our Supreme Court has explained, an employer is strictly liable for sexual harassment by its supervisors. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1041-1042.) For this

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6 In a related contention, Rich attempts to distinguish *Medix*, arguing that it addressed only whether the plaintiff's failure to name some "perpetrators" of sexual harassment -- that is, the Dimases -- in the DFEH charge could be cured by her "alter ego" allegations in a subsequent FEHA action. We disagree. Nothing in *Medix* suggests the plaintiff there alleged that the Dimases had engaged in sexual harassment. (*Medix*, *supra*, 97 Cal.App.4th at pp. 112-113, 115-118.)

reason, when certain employees engage in sexual harassment, their employer may be deemed to "have committed the unlawful practice complained of" without actively or negligently perpetrating the misconduct. (Gov. Code, § 12960, subd. (b).) As the statutory language applies to such an employer, we conclude that it also applies to parties who control the employer, notwithstanding their lack of participation in, or knowledge of, the misconduct. Only if such parties are included in the DFEH proceedings will "the administrative investigation, conciliation attempts, and evidentiary proceedings . . . encompass the entire sphere of the alleged discrimination." (*Cole*, *supra*, 47 Cal.App.4th at p. 1514.) Accordingly, the exhaustion requirement properly applies to these parties, absent a showing that they could not reasonably be identified when the DFEH complaint was filed.

Rich also contends that in naming Koi Restaurant in her DFEH complaints, she also effectively named the Haques and Koi G.P., which are treated as identical to Koi Restaurant under the alter ego doctrine. We disagree. As explained above, the Haques and Koi G.P. are properly regarded as identical to Koi Restaurant only in the presence of equitable considerations closely tied to the exhaustion requirement. Generally, the alter ego doctrine "affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form." (*Sonora Diamond Corp. v. Superior Court*, *supra*, 83 Cal.App.4th at p. 539.) Rich has shown no such "bad faith" conduct here.[7] Accordingly, summary adjudication was properly granted.

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[7] In a related contention, Rich argues that because Koi Restaurant is the alter ego of the Haques and Koi G.P., the omission of their names from her DFEH charges is a mere "naming" error, akin to that addressed in *Hawkins v. Pacific Coast Bldg. Products, Inc.* (2004) 124 Cal.App.4th 1497. There, the plaintiff applied the wrong name to a corporation in his DFEH charge and subsequent complaint in court, and was permitted to

B. *New Trial Motion*

Rich contends that the trial court improperly denied her motion for a new trial. The crux of the motion was that the jury improperly denied an award of punitive damages against Koi Restaurant upon finding that Spence was not a managing agent for Koi Restaurant, despite being instructed that this fact had been conclusively established. The motion sought a new trial on damages or alternatively, additur (Code Civ. Proc., § 662.5).

1. *Governing Principles*

Rich's motion sought a new trial under subdivisions 5 through 7 of Code of Civil Procedure section 657, which provide for relief when damages are inadequate, the evidence is insufficient to justify the verdict, the verdict is "against law," or there is an "[e]rror in law." To the extent Rich's motion relied on insufficiency of the evidence and inadequacy of the damages, the trial court was obliged to weigh the evidence and render an independent judgment regarding the propriety of the verdict. (*Dominguez v. Pantalone* (1989) 212 Cal.App.3d 201, 215 [insufficiency of the evidence]; *Jehl v. Southern Pac. Co.* (1967) 66 Cal.2d 821, 832 [inadequacy of damages].) In making this assessment, "[t]he court does not disregard the verdict, or decide what result it should have reached if the case had been tried without a jury, but instead '[] should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.' [Citation.] [¶] Some courts state the rule to be that 'a new trial cannot be granted ". . . unless after weighing

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amend to add the correct name. (*Hawkins v. Pacific Coast Bldg. Products, Inc.*, at pp. 1502-1505.) This contention fails for want of an adequate showing that Koi Restaurant is properly regarded as identical to the Haques and Koi G.P.

the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision."' [Citation.]" (*Dominguez v. Pantalone*, *supra*, 212 Cal.App.3d at pp. 215-216, italics deleted.)[8]

To the extent Rich's motion asserted that the denial of punitive damages was against law or involved an error of law, a new trial may be granted when the jury, though correctly instructed, returns a verdict contrary to the instructions, or misapplies the law. (8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgment in Trial Court, §§ 42, 44, pp. 628, 629-631.) However, a new trial is properly denied when the evidence at trial establishes what the verdict should have been absent the error. (See *Marriage of Fonstein* (1976) 17 Cal.3d 738, 751.)

Generally, the trial court's ruling on a new trial motion is reviewed for an abuse of discretion. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.) Nonetheless, to the extent the record establishes an error at trial, we make an independent assessment of prejudice. (*Ibid*.) As our Supreme Court has explained, "it is our duty to review all rulings and proceedings involving the merits or affecting the judgment as substantially affecting the rights of a party . . . including an order denying a new trial. In our review of such order denying a new trial, as distinguished from an order granting a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial." (*Ibid*, italics omitted.)

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8 In applying this test, the trial court is sometimes said, somewhat misleadingly, to act as the """thirteenth juror."""" (E.g., *Ganahl v. Certain Individuals* (1962) 204 Cal.App.2d 571, 581.)

2. *Underlying Proceedings*

During discovery, Rich propounded requests for admission upon Koi Restaurant, which including the following request regarding Spence: "Admit that during the term of [Rich's] employment with [you], [Spence] was a managing agent within the meaning of California Civil Code Section 3294[, subdivision] (b)." In May 2006, Koi Restaurant answered "Admit" to this request.

In instructing the jury, the trial court directed the jury to accept admissions made in discovery as true, and submitted to the jury the admission by Koi Restaurant that Spence was its managing agent.[9] During closing arguments, respondents' counsel conceded that Spence was a managing agent for Koi Restaurant.

The special verdict form asked the jury to make detailed findings regarding the remaining defendants' misconduct and Rich's entitlement to compensatory and punitive damages. Regarding Spence, the form requested the jury to determine, inter alia, whether Spence made unwelcome sexual advances to Rich while he supervised her at work, whether he had assigned her to undesirable work stations or shifts, and whether Rich was entitled to an award of punitive damages against Spence as an individual. In addition, regarding punitive damages against Koi, L.P., the form requested the jury to make the following determinations: "Question No. 36: . . . Did [] Spence engage in the conduct with malice or oppression? [¶] . . . [¶] Question No. 37: Was [] Spence an officer, director or managing agent of Koi Restaurant acting in an employment capacity?"

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9 The trial court instructed the jury with CACI No. 210, which states in pertinent part: "Before trial, each party has the right to ask another party to admit in writing that certain matters are true. If the other party admits those matters, you must accept them as true. No further evidence is required to prove them."

The jury found that Spence had sexually harassed Rich, awarded her $5,000 in punitive damages against him as an individual, and answered "Yes" to Question No. 36, but answered "No" to Question No. 37. The jury left blank the portion of the special verdict form asking it to enter the amount of punitive damages to be awarded against Koi Restaurant.

In denying Rich's new trial motion, the trial court concluded that the jury's answer to Question No. 37 was "a technical error at most," and that the denial of punitive damages against Koi Restaurant represented "a measured and calculating or calculated decision to punish the truly culpable and to treat the less culpable with a lighter touch." The trial court further stated that after an independent assessment of the evidence, it had concluded the evidence did not clearly support another verdict. The trial court explained: "[T]he bottom line, I believe, is that there is [an] ample damage award to make Ms. Rich whole in terms of her lost income, her emotional distress and all the rest. We are only talking about punitive damages here which of course she is not entitled to compensate her, to make her whole. They are only for the purpose of making an example of somebody, and my point, here, is the jury seemed to pick the most culpable person to make an example of."

2. *Analysis*

In our view, the trial court did not err in denying a new trial. As our Supreme Court explained in *Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 800-801 (*Brewer*), a jury may properly deny an award of punitive damages even when the factual predicates for such an award are conclusively established: "[A] plaintiff is never entitled as a matter of right to exemplary damages. [Citations.] . . . '. . . A plaintiff, upon establishing his case, is always entitled of

right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.'" (Quoting *Davis v. Hearst* (1911) 160 Cal. 143, 173.)

We find guidance on Rich's contention from *Sumpter v. Matteson* (2008) 158 Cal.App.4th 928. There, the plaintiff alleged that she suffered personal injuries when she was struck by a car driven by the defendant, who was intoxicated. (*Id*. at pp. 931-932.) The plaintiff sought an award of punitive damages against the defendant on the theory that he had "engaged in despicable conduct with a willful and conscious disregard to the rights or safety of others, in that he knew he was under the influence while driving the vehicle." (*Ibid*.) At trial, the defendant admitted that he had used methamphetamines before the incident, that he had ingested drugs just before driving the vehicle, and that he knew he was under the influence when he got into his car. (*Id*. at p. 930.) The jury nonetheless returned a special verdict that the defendant had not engaged in malice or oppression for purposes of a punitive damage award, and awarded the plaintiff compensatory damages but no punitive damages. (*Id*. at p. 932.) The plaintiff unsuccessfully sought a new trial on the grounds that the evidence did not support the verdict, the verdict was contrary to law, and the damages were inadequate. (*Id*. at p. 933.)

On appeal, the plaintiff contended that she was entitled to a new trial on the amount of punitive damage, as the evidence at trial established as a matter of law that she had satisfied the factual predicates for such an award. (*Sumpter v. Matteson*, *supra*, 158 Cal.App.4th at pp. 935-936.) Pointing to *Brewer*, the appellate court rejected this contention, notwithstanding the undisputed evidence the defendant had acted with malice, reasoning that the decision to award punitive damages was the "exclusive prerogative" of the jury. (*Ibid*.)

We reach the same conclusion here. As the trial court observed, the jury's response to Question No. 37 was erroneous, as admissions made in discovery are conclusive against a party (*Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1272-1273 (*Valerio*)), and the jury was so instructed. Following an independent review of the record, we also agree with the trial court that the error was merely "technical," that is, it represented the jury's misapprehension about the appropriate location within the verdict form to register its "measured and . . . calculated decision" to deny punitive damages, rather than a material misunderstanding regarding an award. The jury was instructed that "[t]he purposes of punitive damages are to punish a wrongdoer . . . and to discourage similar conduct in the future[,]" and that it was not required to award such damages; the jury, in fact, awarded punitive damages against Spence. Nothing before us renders it reasonably likely that the jury would have also awarded punitive damages against Koi Restaurant but for a mistake about Spence's status as managing agent, or that the jury would have returned a different verdict had its problematic response to Question No. 37 been brought to its attention.

Rich's reliance on *Valerio*, *supra*, 103 Cal.App.4th 1264 is misplaced. There, a general contractor asserted claims against a subcontractor for breach of contract and quantum meruit. (*Id*. at pp. 1266-1267.) The subcontractor admitted

the existence of a written contract in its answer and in discovery. (*Id*. at p. 1268.) The subcontractor never formally sought to set aside the admissions, but argued at the end of the bench trial that he should have done so. (*Id*. at pp. 1268-1270.) The trial court disregarded the admissions, found there was no written contract, and entered a judgment in favor of the general contractor on the basis of quantum meruit; in addition, the trial court denied the general contractor's motion for a new trial. (*Id.* at pp. 1270-1271.) The appellate court reversed the ruling on the new trial motion, as the trial court's denial of contract-based damages could not be reconciled with the admissions and the subcontractor had never formally sought to set them aside. (*Id.* at pp. 1271-1274.) Unlike the plaintiff in *Valerio*, Rich had no entitlement to punitive damages even if the special verdicts had reflected the pertinent admission, and the record does not reasonably suggest the jury intended to award such damages. In sum, the motion for a new trial was properly denied.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.